

Court No. - 7

Case :- WRIT - B No. - 2306 of 1978

Petitioner :- Ram Asrey And Others

Respondent :- Deputy Director Of Consolidation And Others

Counsel for Petitioner :- U.S. Sahai,Uma Shankar Sahai

Counsel for Respondent :- C.S.C,L.P. Misra,Surendra Sharma

Hon'ble Saurabh Lavania,J.

Case called out. No one appeared on behalf of private respondents to oppose this petition. The present petition is listed under the heading 'THESE CASES SHALL NOT BE ADJOURNED'. As such, this Court proceeded to hear the case finally.

Heard learned counsel for the petitioners and Sri Hemant Kumar Pandey, learned State counsel.

By means of this petition, the petitioners have challenged the order dated 21.05.1973 passed by Assistant Settlement Officer of Consolidation, District Sultanpur (hereinafter referred to as "ASOC") in Appeal Nos. 992 and 1974, which were filed under Section 11(1) of U.P. Consolidation of Holdings Act, 1953 (in short "Act of 1953"). The petitioners have also challenged the order dated 18.07.1978 passed by Deputy Director of Consolidation, District Sultanpur (hereinafter referred to as "DDC") in Revision Nos. 2645 and 2638, which were filed under Section 48 of the Act of 1953.

Before proceeding further, it would be apt to indicate here that earlier this petition was allowed vide order dated 20.10.2008. Thereafter, an application (C.M. Application No. 127124 of 2014) seeking recall of the order dated 20.10.2008 was filed alongwith an application (C.M. Application No. 127123 of 2014) for condonation of delay and this Court after taking note of the averments made in the application(s), recalled the final order dated 20.10.2008 vide order dated 31.08.2017, which on reproduction reads as under:-

"C.M.Application No.127123 of 2014

Considering the statement of affidavit filed in support of the application, the application is allowed and the delay in filing the application for recall of order dated 20.10.2008 is condoned.

C.M.Application No.127124 of 2014

This is an application for recall of order dated 20.10.2008.

The learned counsel for the applicants/respondents has submitted that the opposite parties 3, 4, 5, 6 and 7 had already died and the applications for substitution of their legal heirs were pending, but it appears that those were escaped from mentioning to the court and this court proceeded to decide the matter finally against the dead persons vide order dated 20.10.2008.

Despite time provided to the petitioners, no objection has been filed. I have considered the aforesaid submissions and found it appropriate to recall the order dated 20.10.2008 and restore the writ petition to its original number.

Let a fresh notice be issued to the petitioners to decide the case afresh on merit."

Now reverting to the matter, the dispute in the present case relates to Khata No. 88 situated at Village Khandsara, Tehsil Kadipur, District Sultanpur. In regard to Khata No. 88, the original petitioner No. 1 namely Ram Asrey and Abhai Narain (father of original petitioner Nos. 2 & 3 namely Ram Pyarey and Radhey Shyam), both sons of Sahadeo (in short "claimants/objectors"), filed the objection under Section 9-A(2) of the Act of 1953. In this objection, the relief was also sought with regard to Deep Narain son of Sahadeo. It appears from the copy of order dated 21.06.1971 (Annexure No. 4 to this petition) passed by Consolidation Officer, Kadipur, Sultanpur (hereinafter referred to as "CO") in Case No. 848 that CO declared that Ram Asrey, Abhai Narain and Deep Narain are entitled to 1/4 share of Khata No. 88. The claim of claimants/objectors before the CO was to get share in land indicated in Khata No. 88. The claimants/objectors before the CO stated that it is a joint property and accordingly they are entitled to 1/4 share of the same, as is apparent from para 4 and 5 of the objections (Annexure No. 1 to this petition), which are extracted hereunder:-

"धारा 4- यह कि बाद भूमि में आपत्ति कर्ता का 1/4 भाग है व इस हद तक आपत्ति कर्ता तथा दि० प० नं० 7 बाद भूमि पर अधिकृत है।

धारा 5- यह कि दीप नरायन आपत्ति कर्ता के रूप में नहीं सम्मिलित हो सके हैं अतः उन्हें दि० प० नं० 7 बनाया जाता है। आपत्ति पत्र उनके भी हित में प्रस्तुत किया जा रहा है। अतः प्रार्थना है कि बाद भूमि के 1/4 भाग को मालियत आपत्ति कर्ता तथा दि० प० नं० 7 को दी जाये।"

The claim of above named claimants/objectors was opposed by Ram Abhilakh and others. In the reply to the objections under Section 9-A(2) of the Act of 1953, Ram Abhilakh and others stated that Gopi and Bandhau, sons of

Bhairon, were living separately. Gopi was the elder brother and hence the entry with regard to Bandhau cannot be looked into in representative capacity. The branch of Gopi has been out of possession and hence their claims have been extinguished.

The CO decided the objection on 21.06.1971 in favour of above named claimants/objectors holding that partition never took place and provided 1/4 share in Khata No. 88 to the objectors.

Being aggrieved, the Appeal Nos. 992 and 1974 were filed broadly on the fact that partition took place earlier, as such, the claimants/objectors were not having right over the land indicated in Khata No. 88. The appellate authority/ASOC allowed the appeals vide order dated 21.05.1973 and interfered in the order passed by CO dated 21.06.1971. The relevant portion of the order passed by ASOC dated 21.05.1973 on reproduction reads as under:-

"विवादित खाता के नम्बरान पर अपीलकर्ता गण के पूर्वजों का नाम अंकित है। यदि खाते के दो चार नम्बरान पर सह पूर्वज का नाम दर्ज सिद्ध हो तो जायदाद सह पूर्वज के समय की नहीं समझी जा सकती है। क्योंकि उस समय से व नम्बरान उसी दशा में दर्ज नहीं चले आ रहे हैं विपक्षीगण द्वारा प्रदिष्ट की गयी 1868 की रूलिंग इस मुकदमे में लागू नहीं होगी। क्योंकि विपक्षी द्वारा यह साबित नहीं किया गया है कि विवादित भूमि जब ली गई उस समय यह लोग एक साथ रहते थे तथा संयुक्त परिवार के जायदाद से ली गयी थी। अपीलकर्तागण द्वारा प्रदिष्ट की गयी आर०डी० 1969 की पृष्ठ 175 पर की रूलिंग इस मुकदमे में लागू होती है जिसमें विपक्षीगण स्वयं के नजदीकी खानदान में सहखातेदारी का हक स्वीकृत नहीं किया गया है। विपक्षीगण का हिस्से के अनुसार मालगुजारी अदा करने या कब्जे का प्रमाण भी नहीं मिलता। खाते में केवल कुछ नम्बरान पर कब्जा अंकित होने से सहखातेदारी का हक नहीं माना जा सकता। इन सब तथ्यों के आधार पर चकबन्दी अधिकारी के निर्णय से जिसमें विपक्षी अभय नरायन आदि को सहखातेदार माना गया है। मैं सहमत नहीं हूँ विपक्षीगण इस खाते में अपने को सहखातेदार नहीं सिद्ध कर सके।

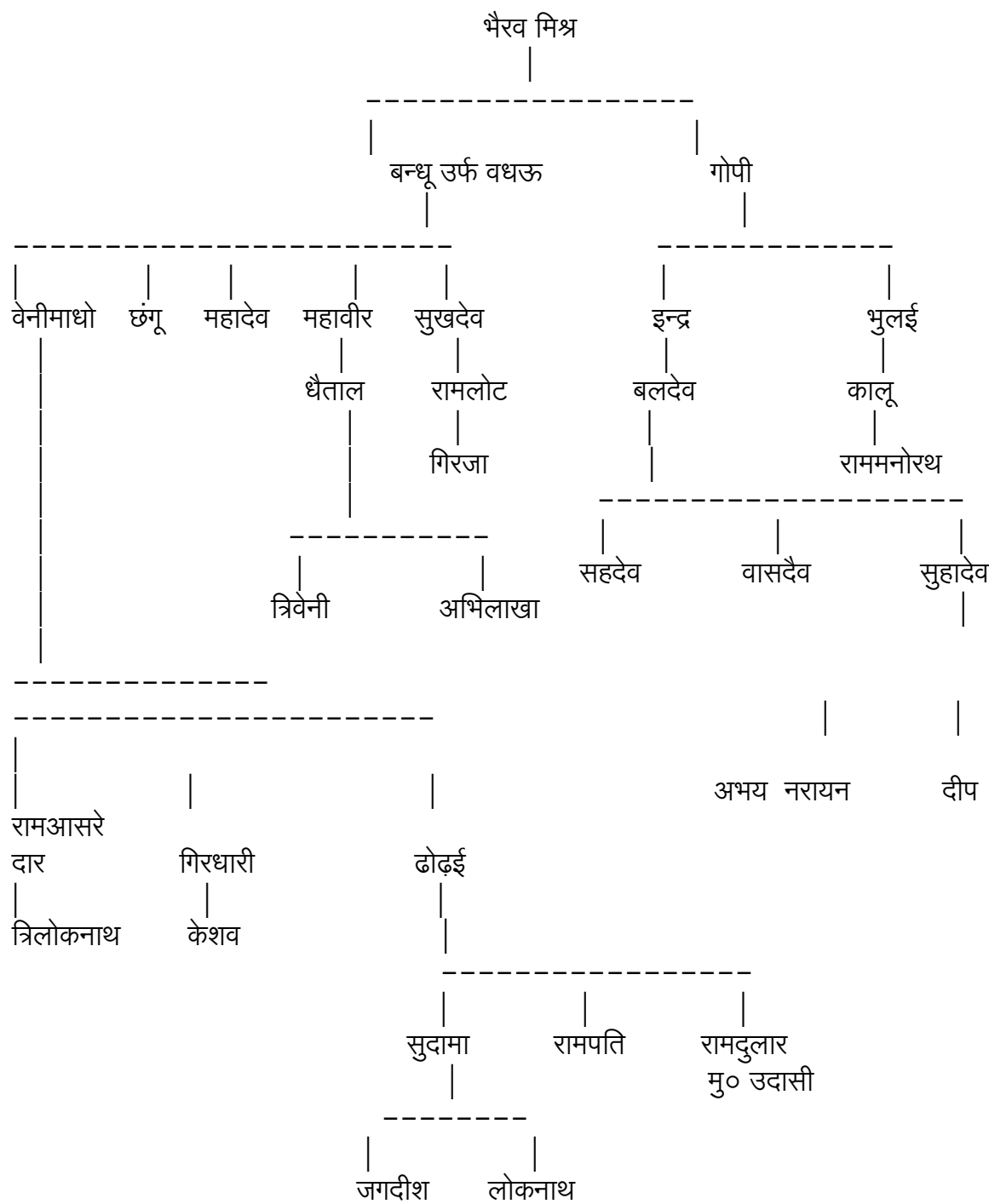
अपील नम्बर 992 पूर्ण रूप से तथा अपील नम्बर 1674 अंशतः केवल अभय नरायन आदि के सम्बन्ध में स्वीकृत की जाती है तथा राम अमिलाख आदि के सम्बन्ध में खारिज की गयी। निर्णय चकबन्दी अधिकारी दिनांक 21.6.71 रद्द किया गया। खाता नम्बर 88 का बटवारा निम्न प्रकार से किया गया। तथा अभय नरायन आदि की आपत्ति खारिज की गयी। वाद अमल दरामद मिसिल दाखिल दफतर हो।"

Challenging the order dated 21.05.1973 passed by ASOC, the Revision Nos. 2645 and 2638 were filed under Section 48 of the Act of 1953. The revisional authority/DDC dismissed the revisions vide order dated 18.07.1978, which on reproduction reads as under:-

"यह दो निगरानियां सबअच० के आदेश दिनांक 21-5-73 के विरुद्ध प्रस्तुत की गई है जो उन्होंने अपील सं० 992 आदि में पारित किया है। चूँकि ये दोनों निगरानियां एक दूसरे से सम्बन्धित हैं तथा एक ही प्राकृति की हैं अतः मैं उनका निस्तारण एक ही साथ करना उचित समझता हूँ।

मैंने पक्षों को सुना तथा कागजात का अवलोकन किया।

निगरानीकर्तागण विवादित खाते की भूमि को सहपूर्वज भैरव मिश्र के समय की भूमि कहते हुए सहखातेदारी की माँग करते हैं। च०अ० के द्वारा उनकी सहखातेदारी की माँग स्वीकार की गई किन्तु स०ब०अ०च० ने उनकी सहखातेदारी की माँग को निरस्त कर दिया तथा आधारवर्ष के इन्द्राज को निगरानीकर्ता के विरुद्ध कायम रखा। पक्षों के मध्य निम्न वंशावली प्रस्तुत की गई जोकि पक्षों को स्वीकार है।



निगरानीकर्तागण अपने को गोपी की साखा का बताते हुए तथा विवादित भूमि को भैरव की बनाई हुई बताते हुए सहखातेदारी की माँग करते हैं जबकि विपक्षीगण इस भूमि को बन्धु के द्वारा गोपी से अलग रहते हुए अर्जित की हुई बताते हैं। तथा उनकी ओर से यह कहा गया कि पक्षों के मध्य 40-50 वर्ष से अधिक अलगा विलगी है व पक्षों के मध्य पारिवारिक विभाजन हो चुका है। इस तथ्य को निगरानीकर्तागण भी स्वीकार करते हैं। यह भूमि ग्राम खाडसरा में स्थित है। विभाजन में विपक्षीगण की ओर से कहा गया है कि इस ग्राम की भूमि विपक्षीगण को प्राप्त हुई तथा विपक्षीगण ही इस ग्राम के रहने वाले हैं जबकि निगरानी कर्ता ग्राम चौपरिया के रहने वाले हैं तथा वहां की भूमि पारिवारिक विभाजन के अनुसार निगरानीकर्तागण को प्राप्त हुई है। निगरानीकर्ता के अधिवक्ता द्वारा मेरा ध्यान इस ओर

आकर्षित कराया गया कि स०ब०अ०च० ने अपने आदेश में यह गलत लिखा दिया है कि विवादित भूमि बन्दोवस्त ओवल, दोयम तथा सोयम व उसके वाद केवल विपक्षीगण के नाम या उनके पूर्वजों के नाम दर्ज है जबकि इस भूमि के अनेक गाटे दोनो पक्षों के सहपूर्वज बन्धू के नाम भी दर्ज है। तथा इन्द्र के नाम भी दर्ज है। निगरानीकर्ता के अधिवक्ता की यह बात अभिलेख के अवलोकन से सत्य पाई गई कि विपक्षीगण के अधिवक्ता द्वारा यह कहा गया कि निगरानीकर्ता अपने ही साखा के राम मनोरथ को सहखातेदार के अधिकार स्वीकार नहीं करते हैं अतः वह उससे कैसे सहखातेदार के अधिकार माँग सकते हैं। उसके विरुद्ध निगरानीकर्ता के अधिवक्ता द्वारा यह कहा गया कि राममनोरथ की ओर से माननीय उच्च न्यायालय में अभी वाद का फैसला नहीं हुआ इसके समर्थन में उन्होंने माननीय उच्च न्यायालय के रिमान्ड आदेश की नकल प्रस्तुत की जिससे यह सिद्ध होता है कि अभी राममनोरथ व उनके मध्य भी मुकदमेबाजी चल रही है। इस प्रकार से इस तर्क के आधार पर विपक्षीगण को कोई लाभ नहीं प्रदान किया जा सकता है। विपक्षीगण के अधिवक्ता ने मेरा ध्यान अभय नरायन के बयान की ओर आकर्षित किया जिसमें अभय नरायन ने यह स्वयं बयान दिया है कि विवाद भैरव के समय की भूमि से सम्बन्धित है तथा ग्राम खाडसरा के भूमि के बटवारे के बारे में उन्होंने दावा किया था जो दावा भैरव के समय की भूमि के बारे में स्वीकार किया जा चुका है इस प्रकार से स्वयं अभय नरायन के बयान के अनुसार जो भूमि विवादित थी उसके बारे में बटवारे के दावे के अनुसार उन्हें हक पहले से ही प्राप्त हो चुकी है। यह बात समझ में नहीं आती है कि अब शेष भूमि के बारे में भी निगरानीकर्ता को कोई अधिकार प्राप्त था तो उन्होंने उस भूमि के बारे में भी क्यों नहीं उसी समय बटवारे के लिए दावा प्रस्तुत किया। पक्षों के मध्य बटवारा बहुत अर्से पूर्व से स्वीकार है जिससे यही सिद्ध होता है कि पक्षों के मध्य काफी लम्बे अर्से से पारिवारिक विभाजन हो चुका है। तथा इस विभाजन के अनुसार ग्राम खाडसरा की भूमि विपक्षीगण को प्राप्त हुई थी तथा ग्राम चौपरिया की भूमि निगरानीकर्तागण को प्राप्त हुई थी। वे इस विभाजन से सन्तुष्ट भी थे। तथा जिस भूमि से निगरानीकर्तागण संतुष्ट नहीं थे उसके बारे में पहले भी विभाजन का दावा कर चुके हैं। इससे यही सिद्ध होता है कि ग्राम खाडसरा की शेष भूमि के बारे में यह विपक्षीगण के अधिकार को स्वीकार कर चुके हैं। यद्यपि निगरानीकर्ता के अधिवक्ता ने यह तर्क प्रस्तुत किया कि पारिवारिक विभाजन से पक्षों के मध्य अंतिम बटवारा नहीं माना जाना चाहिए किन्तु इतने लम्बे अर्से पूर्व किए गए पारिवारिक विभाजन का भी उतना ही महत्व है। तथा यह विभाजन पक्षों के मध्य पत्रावली पर उपलब्ध साक्ष्य से बटवारा के रूप से स्वीकार कर लिया जाना प्रतीत होता है। इसके अतिरिक्त भैरव व बन्धऊ आदि के समय से जो भूमि चली आ रही व उसकी समरूपता में भी पर्याप्त अंतर हो चुका है चूँकि पक्षगण स्वयं काफी अर्से पूर्व से पारिवारिक विभाजन स्वीकार करते हैं। इसलिए यह वाद में सफल होने हेतु निगरानीकर्ता द्वारा यह आवश्यक था कि वे सिद्ध करते कि पक्षों के सहपूर्वज भैरव के वाद जो भूमि बन्धऊ अथवा गोपी के द्वारा अर्जित की गई वह संयुक्त परिवार में रहते हुए तथा संयुक्त सम्पत्ति से अर्जित की गई थी। इस सम्बन्ध में निगरानीकर्ता ने बन्धऊ को अगुआ परिवार भी होना सिद्ध नहीं किया है तथा चूँकि बन्धऊ तथा इन्द्र के ही नाम अतिरिक्त रूप से अलग-अलग भूमि दर्ज की गई इसलिए भी विपक्षी के अधिवक्ता के इस तर्क में बल प्रतीत होता है कि गोपी तथा बन्धऊ के समय से ही दोनो पक्षों के मध्य विभाजन हो चुका है तथा दोनों पक्ष में अलग अलग रहकर सम्पत्ति अर्जित की।

उपरोक्त विवेचन के आधार पर निगरानीकर्तागण अपने वाद को सिद्ध करने में सफल नहीं रहे थे तथा सबअच० का निर्णय सही व न्यायसंगत प्रतीत होता है।

दोनों निगरानियां निराधार हैं और खारिज की जाती हैं।"

In the aforesaid background of the case, the present petition has been filed.

Assailing the impugned orders dated 21.05.1973 and 18.07.1978, learned counsel for the petitioners submitted that the family property, which was originally recorded in the name of Bhairon, was never partitioned, as such, the

petitioners and their predecessors were entitled to share in the property including the property indicated in Khata No. 88, as such, the findings recorded by the ASOC and DDC in the impugned orders dated 21.05.1973 and 18.07.1978, respectively, are liable to be interfered with by this Court.

To substantiate the aforesaid, learned counsel for the petitioners only placed reliance on the order passed by the trial court dated 18.05.1961 in Suit/Case No. 32 of 1960, which was filed under Section 176 of U.P. Zamindari Abolition and Land Reforms Act, 1950 (in short "Act of 1950") by Abhai Narain, Deep Narain and Ram Asrey.

Based upon the order dated 18.05.1961, it has been stated that the aforesaid suit was filed with regard to property situated at Village Khandsara, in which, the plea of partition was taken, however, the same was not accepted and considering the pleadings on record, the suit was decided in favour of plaintiffs holding that they are having 1/2 share over the property in suit.

At this stage, on being asked that which was the property in issue in suit, learned counsel for the petitioners, based upon the copy of order dated 18.05.1961 as also the pleadings on record, failed to indicate the property in issue in suit.

It is appropriate to mention here that the order passed in partition suit No. 32 of 1960 dated 18.05.1961 indicates that the case of above named plaintiffs in the suit was to the effect that the land in suit was in co-tenancy of the plaintiffs & defendant Nos. 3 to 9 and the same was situated at Village Khandsara and the allegation that the land in suit was partitioned, was not accepted by the regular/trial court.

The case of the side opposite, as appears from counter and supplementary counter affidavit, is to the effect that family partition took place more than 50 years ago and as per the same, the land situated at Village Khandsara went towards the share of Bandhau's branch and land situated at Village Chauparia went towards the share of Gopi's branch. To support the fact related to partition, side opposite has brought on record the statement of one Patiram (defence witness), which on reproduction reads as under:-

"मैं पतीराम सुत ढोढई उमर 55 साल सा० खडासरा पो० अल्देमऊ तहसील कादीपुर वहल्फ बयान किया कि आराजी निजाई जानता हूँ। बधऊ व गोपी को जानता हूँ ये दोनो अलग अलग रहते थे इनकी खेती बारी रहन सहन सब अलग हो गयो था गोपी चौपटिया रहते थे वभऊ खडसरा रहते गोपी बधऊ में गोपी बडे थे दोनों सगे भाई थी आराजी विजई मेरा जिजा के जमाने की नहीं है। यह हमारे आज्ञा वेनी माधो को बनाई है ये लोग चौखटिया में मुधत से रहते है। इनकी कोई खेती बारी इस गाँव में नहीं है और न इनका कोई कब्जा व दखल ही है और न ये लोग कभी कब्जा व दखल करने जाते है हमारी कुछ जमीन मातहत थी जो मेरी जमाने की थी जिसके बारे में दावा दायर करके अपना हिस्सा ले चुके है आज्ञा से मालूम हुआ कि यह आराजी वेनी माधव को बनाई है और गोपी व वजऊ अलग अलग रहते थे।"

Considered the aforesaid and perused the record.

Undisputedly, the case setup by the original petitioner No. 1, predecessors in interest of the original petitioner Nos. 2 & 3, before the CO was based upon the fact that the land recorded in Khata No. 88 is a joint property, as such, they are entitled to the share. To prove the jointness, petitioners' counsel has placed reliance on the order passed by regular/trial court dated 18.05.1961.

The CO while allowing the claim of the petitioners specifically observed that the onus of proving partition in the family was on the defendants but they failed to produce cogent evidence.

However, as per the established principles, the claimant has to prove his case and he can succeed on the strength of his own legs and not on the weakness of side opposite. In the case of ***Rangammal v. Kuppuswami, (2011) 12 SCC 220***, the Hon'ble Apex Court observed that "*Thus, the Evidence Act has clearly laid down that the burden of proving a fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.*"

In the case of ***Jai Narain v. D.D.C., [1979 RD 198]*** it was held that the presumption is only in respect of jointness and not that any property acquired by members of the family is a joint family property. It may be thrown in the common stock or the members may intend it to be treated as joint family property or it may be acquired by joint family nucleus. But this is a matter of evidence and not of presumption.

In the case of *Sheo Nath v. D.D.C.*, [1983 RD 107] it was held that a member of the joint family or even a Karta of the family can acquire property for himself and in his own name and that the other members of the family would have no interest or share in it if he had acquired it from his own funds. But if the tenancy holding was acquired with the aid and assistance of the joint family funds while the family was joint, then other members of the joint family would also have a share in it although it may be recorded in the name of an individual member of the joint family. It was also held in this case that it is well settled that the claim of co-tenancy rights cannot be upheld merely on the strength of recorded possession over certain plots of the disputed holding and receipt for rent and canal dues made by the claimant. If a holding is entered in the name of one or more members of the family and another member claims a share in the holding, the burden of proving that the holding was joint family property and the name of recorded person or persons was in the representative capacity lies heavily on the claimant.

In the judgment passed in the case of *Jagdamba Singh v. Dy. Director of Consolidation*, 1984 SCC OnLine All 689 : 1985 All LJ 671, this Court observed as under:-

"14. It is fairly well settled that in order to entitle a party to claim co-tenancy rights in the holding on the ground of its being ancestral the unbroken identity of the holding has got to be established throughout the period. If the identity has changed of the holding the claim cannot succeed. This view has been expressed in several decisions of Board of Revenue and also of this Court in the cases noted below:—

- (1) 1943 Rev Dec 567 (BR)*Jodhia v. Bhikwa*.
- (2) 1942 Rev Dec 379 (BR)*Hamid Ali v. Benares Bank*.
- (3) 1942 Rev Dec 401 (BR)*Mohd. Yasin v. Mohd. Shafi*.
- (4) 1945 Rev Dec 122 (BR)*Rajaram v. Narain Singh*.
- (5) 1969 Rev Dec 175 (BR)*Abhai Narain v. Ram Manorath*.
- (6) 1973 Rev Dec 242 (BR)*Aminuddin v. Kamuruddin*.
- (7) 1975 Rev Dec 195 (BR)*Ram Narain v. Buddhu*.
- (8) 1963 Rev Dec 37 (BR)*Mahadeo Singh v. Sunder Kewat*.
- (9) 1979 Rev Dec 125 : (1979 All LJ NOC 47) (BR)*Balwanti v. Bhaiya Ram*.
- (10) 1983 (1) Lucknow Civil Decision, 40 (HC)*Jhagroo v. The Deputy Director of Consolidation*.

15. In all the aforesaid decisions it has been consistently held that in order to uphold the claim of co-tenancy rights on the ground of land being ancestral it is essential that the entire land of the holding of the common ancestor must have come down in the identical form as it must have remained unchanged and intact. It would, however, be correct to say that where as a result of survey made during settlements, the area of some plots might have decreased or increased or that some

plot or plots are eliminated for some explained reason from the holding in question viz. having fallen in the bed of river due to the alluvial and deluvial action of the river or by the construction of the canal etc., then in such event it cannot be said that there is break in the identity of the holding in dispute. The slight change like elimination of certain plot or the increase or decrease in the area of certain plots for the aforesaid reasons shown would not operate to destroy the identity of the holding coming down in identical form in the family from the time of common ancestor. But in order to uphold the claim of co-tenancy rights on the ground of land being ancestral it must be established by the claimant that the holding has come down intact and in identical form that it has not been sub-divided or resettled with one or some of the heirs or with the strangers. Thus, where the disputed holding has not come intact in the identical form and only some of the plots of the holding belonging to common ancestor are found included as in the present disputed holding it would not make it ancestral holding so as to give a share in it to the claimants on that ground nor it would be permissible to pick up those plots from the holding and declare them to be ancestral property and give a share in those plots to the claimant.

16. Learned counsel for the opposite parties had urged that in the present case there is no evidence regarding resettlement of the land with Mata Dihal Singh, and, as such, the opposite parties 1 to 3 have committed no error in giving co-tenancy rights to opposite parties 5 to 8 in those plots of the holding which initially belonged to Devi Singh. I am unable to agree with this contention. In second settlement of 1301F, the present holding in dispute was recorded in the name of Mata Dihal Singh. Although it contained 19 plots which initially belonged to Devi Singh, but this holding consisted of 43 plots with an area of 43 bighas, 19 biswas and 16 biswansis on an annual rent of Rs. 117-6-3. It is thus evident that 24 plots which did not belong to Devi Singh were also included in the holding which was settled with Mata Dihal Singh on aforesaid annual rent by the then landlord. Similarly, in 1301 F., a separate holding is recorded in the name of Ram Baran Singh consisting of 19 plots out of which 5 plots belonged to Devi Singh. These two holdings were thus apparently settled by the landlord separately with these persons, Mata Dihal Singh and Ram Baran Singh. This entry is 90 years old and it is practically impossible to produce direct evidence on the question regarding settlement of land by the landlord with these persons. The entry itself affords the evidence regarding settlement with these persons — especially when all those plots which belonged to Devi Singh had not come down in identical form in none of these holdings which came to be recorded separately in the name of Mata Dihal Singh and Ram Baran Singh. In this view of the matter I do not find any substance in the aforesaid arguments of the learned counsel for the opposite parties. It is not disputed before me that the suits for ejectment and arrears of rent were filed by the landlord against Mata Dihal Singh and also against Ram Baran Singh in respect of the land-holding which were recorded in their names. Admittedly, Ram Baran Singh was ejected in the suit filed by the landlord for arrears of rent and ejectment as he could not pay the arrears of rent outstanding against him. The grandfather of the petitioners Mata Dihal Singh was not ejected as rent was paid by him. Landlord had also filed suits for ejectment in respect of the holding in dispute against the petitioners. It is thus evident that the petitioners and

their predecessors were always treated separate tenure-holders of the land in dispute by the landlord.

17. Thus, in this view of the matter I find that neither the disputed holding nor any portion thereof could be held to be ancestral holding coming down from the time of common ancestor Devi Singh as it has not come down in the identical form, and, as such, the opposite parties could not be declared to be co-tenure-holders by picking uncertain plots from the holding in dispute and treating them to be ancestral on the ground that those initially belonged to Devi Singh.

18. Learned counsel for the opposite parties had contended that the opposite parties 1 to 3 cannot be said to have fallen in error in giving share in those plots of the disputed holding which belonged to Devi Singh. I am unable to agree with this contention as well. Where the holding of the common ancestor, as already observed above, has not come down intact in identical form the claimant cannot be granted co-tenancy rights only in some of the plots of the disputed holding merely on the ground that those initially belonged to the common ancestor. This question cropped up for consideration before Board of Revenue in *Mohd. Yasin v. Mohd. Shaft*, 1942 Rev Dec 401 (BR) wherein Sathe, J. observed:—

“The mere fact that land comprised in several holding belonged to a common ancestor is not enough to hold that it belongs to all the descendants of the common ancestor. One essential thing which is necessary for this is that the identity of the holding must have continued unbroken. If the land was divided between two branches of the family by a family arrangement and some holdings are entered in the name of one branch or the other and some jointly, it will be inequitable to pick out some of the resultant holdings and say that they belong to both the branches as they belonged to one ancestor.”

19. In (sic) *Udal Singh v. Hardayal*, 1973 Rev Dec 242 (BR) it has been observed:—

“It was more than clear that the holding had not come in the identical form from the ancestor. The holding may have been acquired by the plaintiffs' ancestor in 1872 or thereabouts and it appears to have continued in that form until 1924 or thereabouts, but then it changed hands and while part of the old plots were retained some additions and alterations were made and instead of occupancy a new hereditary tenure was created in favour of the new lessees. It is obviously, therefore, not possible to hop back to the year 1900, and then assume in spite of the lack of continuity that since the ancestors were co-tenure-holders in the year 1900, they should be regarded as co-tenure-holders in any new settlement made with some of the members of the family.”

20. Similar view was expressed by Board of Revenue in *Ram Narain v. Buddhu*, 1975 Rev Dec 195 (BR), wherein it was held:

“Where the original holding of the common ancestor has not come down in an intact form the plaintiffs cannot claim co-tenancy in respect of only one part of common ancestor's holding”.

21. I have carefully gone through these decisions and in my opinion, the Board of Revenue has taken a correct view on the point that in order to uphold the claim of co-tenancy rights on the ground that the holding in dispute is ancestral property, it is necessary that the holding should have come down intact in the identical form without any break

and it would not be open to pick up few plots of the holding which initially belonged to common ancestor and declare them to be ancestral property giving a share to the claimant on that ground. The claim of co-tenancy rights cannot be upheld in respect of certain plots of the holding but the claim is to be considered and is to be accepted or rejected in toto in respect of the holding and not in respect of any portion thereof. In this view of the matter I find that the opposite parties 1 to 3 committed error in granting co-tenancy rights to the opposite parties 5 to 8 in 36 plots of the disputed holding merely on the ground that these plot's initially belonged to Devi Singh, and, are therefore, ancestral property. This view is absolutely erroneous and in view of what has been said above, the said plots in question cannot be held to be ancestral holding so as to give co-tenancy rights to the opposite parties 5 to 8 in those plots. In my opinion no co-tenancy rights could be legally granted in respect of a part of the holding and, as such, the impugned orders passed by opposite parties 1 to 3 granting opposite parties 5 to 8 co-tenancy rights in respect of the part of the holding (36 plots), cannot be legally sustained.

22. Learned counsel for the opposite parties Sri Hargun Charan, however, urged that even if the claim of the opposite parties 5 to 8 cannot be sustained on the ground that the disputed holding is ancestral, yet their claim is sustainable on the ground that the entire land of the disputed Khata No. 36 is joint family property and the name of Mata Dihal Singh was recorded in the representative capacity as he was head and Karta of the joint family. His further contention was that even if it be held that the holding in dispute consisting of 84 plots with an area of 44 bighas, 9 biswas, 14 biswansis was settled afresh by the landlord with Mata Dihal Singh, the same would be deemed to be joint family property as at the time of acquisition he was head and Karta of the family being elder brother. Learned counsel pointed out that the opposite parties 1 to 3 have recorded a finding to the effect that at the time of second settlement in the year 1301 F., both these brothers Mata Dihal Singh and Ram Baran Singh formed joint family and on the basis of this finding learned counsel urged that even if land of the disputed holding was acquired by Mata Dihal Singh, but the same would be treated to be joint family property and the opposite parties 5 to 8 would get half share in all the plots of the disputed holding-Khata No. 36. I am unable to agree with this contention as well.

23. It is well settled that the creation of tenancy in respect of agricultural land is a matter of contract between the landlord and the tenant. Even in the joint Hindu family a member of the joint family could acquire land for himself and unless it is proved that the land was acquired by him in the representative capacity and for the benefit of the family, it cannot be held to be joint family land merely because it was acquired by him when he formed joint family with other members. Even a Karta of joint Hindu family can acquire land in his name for his own benefit and it cannot be treated to be joint family property merely because he happens to be Karta of the family at the time of the alleged acquisition of the property. It has to be positively proved that when the land was acquired by the Karta of the joint family he had acquired it in the representative capacity for the entire body of coparceners and it is treated as such by the members of the family.

24. It appears to be fairly well settled that when joint family is possessed of sufficient nucleus and the Head or Karta of the family had, as a matter of fact, in his possession joint family funds, while acquiring certain property in his own name, the onus would lie on him to prove that it was his self-acquired property and that it was not acquired with the aid or assistance of the joint family funds. But even this rule cannot be always pressed in service in the matter relating to acquisition of agricultural tenancy lands because no premium (Najrana) can be legally charged by the landlord while letting the land to the tenant. It therefore, cannot be assumed that in every case while obtaining lease of agricultural land the tenant must have paid some premium (Najrana) to the landlord and that too from the joint family funds. In *Bhagirath Devi Kumar Rani Sahaba v. Agricultural Income Tax Revision Board*, 1970 Rev Dec 365 : (1971 Tax LR 81), while considering this question, the Division Bench of this Court held:—

“No doubt a presumption arises in Hindu law that property standing in the name of a member of Hindu undivided family must be presumed to have been acquired from Hindu undivided family funds, and, therefore, to be Hindu undivided family property, where the member of the family does not possess sufficient funds of his own for the purposes of acquiring the property. But in a case where acquisition of the property does not require any expenditure of funds, the presumption cannot be raised.

In the instant case, no funds were required because payment of Nazrana for the acquisition of tenancy lands had been declared illegal by law.”

25. Thus in this view of the matter and also in the absence of any positive evidence, I find it difficult to assume that Mata Dihal Singh while he acquired land of the disputed holding had paid some premium to the landlord and that too from the joint family funds. In the present case it was neither asserted nor proved that the land in dispute was acquired by Mata Dihal Singh with the aid or assistance of the joint family funds, and, as such, simply because the land in dispute was recorded in the name of Mata Dihal Singh it cannot be assumed to be joint family property because even in a joint family any member or even a Karta of the joint family can acquire land in his name for his own benefit. It has to be shown positively that it was neither acquired in the representative capacity by the Karta of the joint family or that it was blended as joint family property and was treated as such and that all the members of the joint family were in possession over it. But where no such case was set up nor established, the claimants cannot get co-tenancy rights merely because the disputed holding is recorded in the name of the Karta of the joint family or in the name of any member of the joint family. The claim of co-tenancy rights in such land by unrecorded member of the joint family can only be accepted if it is established that the land in dispute was acquired in the representative capacity and was blended as joint family property and was treated as such. The burden of proof that the land was acquired by the recorded tenure-holder in the representative capacity, lies heavily on the person who asserts that it was acquired as such.

26. In the present case it is very well evident that both Mata Dihal Singh and his brother Ram Baran Singh had separately acquired land and their names are recorded as separate tenure-holders on different

holding in second settlement of 1301F. So even if they formed joint family at that time, the land recorded in their names could not be treated to be joint family property because it is well settled that any member of the joint family or even a Karta can acquire land in his own name for his own benefit and it will not become a joint family property merely because he happens to be a member of the joint family at the time of acquisition of that Ind. (See *Sattoo v. Dy. Director of Consolidation* W.P. 2417 of 1979, decided by me on 15-10-1981). Similar view was expressed in 1977 All WC 418 : (AIR 1976 All 502), *Dildar Husain v. Ali Husain*, wherein it was observed that there could be no bar to the acquisition of land by an individual even though he might be joint in estate with his other brothers but by virtue of this fact they could not automatically become co-tenants with that individual who had obtained acquisition in individual name.

27. In view of the above I am unable to accept the contention of the learned counsel for the opposite parties that the land which was recorded in the name of Mata Dihal Singh was acquired in the representative capacity or that it was a joint family property. Ram Baran Singh had also separately acquired the land which was recorded in his name in the second settlement of 1301 F. In these circumstances it cannot be said that Ram Dihal Singh acted in representative, capacity when he acquired land which was recorded in his name in the second settlement of 1301 F. If he was acting as Karta of the joint family there was no occasion for separate acquisition of land by Ram Baran Singh and recording of his name on a separate holding in the second settlement. Thus even if it be held that both these brothers formed joint family at the time of the second settlement that holding in dispute cannot be held to be joint family property so as to give a share to the opposite parties 5 to 8 on that ground. It is well settled that where a member of the joint family has been recorded as a sole tenant even during the last settlement and there is nothing to show that the holding was leased out to him or to his predecessor-in-interest in the representative capacity, there would be a presumption, though rebuttable, that the settlement entry is correct and the other members of the family cannot claim to be co-tenants merely on the ground that they were members of the joint family.

28. The acquisition of land in the representative capacity either by the Karta or a member of joint family can be established by the evidence led directly to establish the fact that the landlord had settled the land with him in the representative capacity for all the other members of the family as well and that all the members of the joint family came into possession over the land which was blended and treated as joint family property. The evidence establishing the fact about joint possession of all the members of the joint family on the land of holding till it remained undivided or over specific plots of the holding by members of the family to the extent of their respective shares, by way of mutual partition in the event of separation in the family and the payment, of land revenue by them either directly to landlord or through the recorded person, would no doubt be very material circumstance and a piece of admissible corroborative evidence to establish the fact regarding acquisition of land in the representative capacity by the recorded person. It may, however, be expressed to clarify that merely by being in possession over certain plots would alone be not enough to establish that the land was acquired by the recorded tenant in the

representative capacity because no amount of common living and the use and enjoyment of the land jointly or severally would make the claimant a co-sharer in the holding or for treating it to be joint family property acquired in representative capacity. It has to be established by cogent evidence that the land was in fact acquired by the recorded person as Karta in the representative capacity for the benefit of all the members of the joint family and it was blended and always treated as joint family property by the recorded person without any objection by the landlord to it and that the claimants have remained in possession over the land of the holding to the extent of their share in it and paid its rent. It be also shown that the possession of claimants over the land of the disputed holding was in their own right and not by way of any arrangement as licensee on behalf of the recorded tenant or for any other consideration on his behalf.

29. In the present case I find that the opposite parties 5 to 8 have not been able to prove their possession and their claim regarding co-tenancy has been upheld on the basis of constructive possession which, in my opinion, is altogether erroneous view. The doctrine of possession of one co-tenant is that of all co-tenants can only be invoked where co-tenancy is either admitted or established. In the present case the petitioners have seriously refuted the claim regarding co-tenancy rights asserted by opposite parties 5 to 8 and have also failed to establish it on merits as already observed above. Thus the impugned orders passed by opposite parties 1 to 3 cannot be sustained and deserve to be quashed."

In the judgment passed in the case of *Sanehi and Another vs. Deputy Director (Cons.) Faizabad and Others, 1985 All CJ 2306*, this Court, with regard to claim based upon the co-tenancy, observed as under:-

"6. The foremost crucial question for consideration in the writ petition is as to whether the land of the disputed holding is ancestral and is coming down in the identical form or not. In order to claim co-tenancy rights by an unrecorded tenant it has to be proved that the land in dispute is either ancestral holding or it was acquired in the representative capacity by the recorded tenure holder or that it was acquired with the aid and assistance of the joint family funds or that it was their joint acquisition and unfortunately their names were not recorded.

7. In order to establish whether the land in dispute is ancestral holding coming down from the time of the common ancestor, it is very necessary to establish that the land has come down in the identical form and with unbroken period, and as such, mere recording of the name of common ancestor earlier on some of the plots of the holding would not be enough for holding that the land of the disputed holding is ancestral property. It may, however, be clarified that the increase or decrease in the area of certain plots of the holding as a result of resurvey made during the settlements or elimination of one or two plots from the holding recorded in the name of common ancestor for certain good reasons shown would not affect or alter the identity of the holding which has otherwise retained its character having come down in the identical form without any break in the continuity of tenancy

from the time of common ancestor. If the identity of the holding has changed and it has not come down in identical form, it can then very well be assumed to have been settled with the recorded tenure holder and it cannot be treated to be ancestral holding so as to give a share to the unrecorded claimant claiming a share in it merely on that ground."

In the case of ***Bodh Raj v. Joint Director of Consolidation, Faizabad***, **1995 SCC OnLine All 614 : (1996) 27 ALR 98**, this Court observed as under:

"12. Therefore, in view of the case law, cited above, it is clear that there is a presumption with respect to jointness of family and if it is shown or proved to the satisfaction of the court that the family was joint then the property inherited from a common ancestor will be deemed to be joint property of all. It is also clear that the joint family funds must be used for purchase of the property in order to make it joint. Individual member of the joint family can also acquire property in his own name from the separate fund and that property will not be treated to be joint family property and if the property is entered in the name of one person then it has to be proved by other party, who claims to be joint property that it was acquired by the joint family funds."

This Court in the case of ***Bajrangi vs. Joint Director Cons. Raebareli*** reported in **2020 SCC OnLine All 2066 : (2020) 147 RD 683**, after considering the judgment passed in the case of *(Smt.) Dharmawati Tiwari v. Prem Shanker Tiwari*, 1999 (17) LCD 81; *Sheo Nath v. Deputy Direction of Consolidation*, 1983 RD 107; *Sonu and Rahul v. Board of Revenue*, (2010) 109 RD 679; *Shiva Nath v. Deputy Director of Consolidation, Varanasi*, (2014) 123 RD 323; *Ruchha v. Deputy Director of Consolidation, Gorakhpur*, 2007 (25) LCD 1420; *Shrinivas Krishnarao Kango v. Narayan Devji Kango*, AIR 1954 SC 379; *Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade*, (2007) 1 SCC 521 : (AIR 2007 SC 218; AIR 2006 SCW 5562; (2007) 1 AIR Kant R 17); *K.V. Narayanaswami Iyer v. K.V. Ramakrishna Iyer*, AIR 1965 SC 289; *Rukhmabai v. Lala Laxminarayn*, AIR 1960 SC 335; *Achuthan Nair v. Chinnamu Amma*, AIR 1966 SC 411; *Surendra Kumar v. Phoolchand (Dead) Through L.Rs.*, (1996) 2 SCC 491 : (AIR 1996 SC 1148 : AIR 1996 SCW 695); *D.S. Lakshmaiah v. L. Balasubramanyam*, AIR 2003 SC 3800 and *Makhan Singh (D) By L.Rs. v. Kulwant Singh*; (2007) 10 SCC 602 observed as under:-

"22. This court in the case of *Sheo Nath v. Deputy Director Consolidation* (supra) has held that if a holding is entered in the name of one or more members of the family and another member claims a share in the holding the burden of proving that the holding was joint family property and the name of recorded person or persons was in the

representative capacity lies heavily on the claimant. It has further been held that the law is fairly settled that the member of the joint family or even a Karta of the joint family can acquire property himself and own his name and the other members of the family would have no interest or share in it if he has acquired it from his own fund.

23. This Court in the case of *Sonu and Rahul v. Board of Revenue* (supra) has held that rights of a Bhumidhar are transferable and this power of transfer is only subject to the provisions of the [Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950](#) and under the said act the principles of coparcenary property are not applicable to Bhumidhari rights. It has also been held that in absence of any material it could not be shown that the family had any nucleus or Joint Hindu Family fund. The relevant paragraphs 3, 4, 5 are reproduced as under: —

“(3) The only point urged by the learned counsel for the petitioners is that the land in dispute was purchased by Chandra Shekhar out of Joint Hindu Family fund and as such the petitioners were not even born on the date of the sale deed. There is no material on record to show that the said family had any nucleus or Joint Hindu Family fund. The sale deed stands in the name of Sri Chandra Shekhar alone.

(4) A Division Bench of this Court in the case of *Mahendra Singh v. Attar Singh*, has held that the Bhumidhari rights are special rights created by Act I of 1951 and these new rights are solely to be governed by the provisions of the Act. The notions of *Hindu Law* or *Mohammedan Law* which would be applicable to other property not governed by any special law can not be imported into the rights created by this Act.

(5) By Section 152 of the U.P. Zamindari Abolition and Land Reforms Act, rights of a Bhumidhar are transferable and this power of transfer is only subject to the provisions of this Act, Under the Act the principles coparcenary property are not applicable to Bhumidhari rights.”

24. This Court in the case of *Shiva Nath v. Deputy Director of Consolidation, Varanasi* (supra) after considering the judgments of the Hon'ble Apex Court has held that the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden it shifts to the party who claims that the property has been acquitted by him through his own source without the aid of the joint family property and there can be no presumption in law that a property purchased in the name of a member of a family had ipso facto the character of Joint Hindu Family property unless it could be shown that the family possessed a nucleus for the purchase of the same.

25. The Hon'ble Apex Court in the case of *Shrinivas Krishnarao Kango v. Narayan Devji Kango*, [AIR 1954 SC 379](#) has held that so far as the proposition of law is concerned, the initial burden is on the person who claims that it was joint family property but after initial discharge of the burden, it shifts to the party who claims that the property has been purchased by him through his own source and not from the joint family nucleus.

26. The Hon'ble Apex Court in the case of *Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade*, [\(2007\) 1 SCC 521](#) :

([AIR 2007 SC 218](#); AIR 2006 SCW 5562; (2007) 1 AIR Kant R 17) after considering other decisions has held that on survey of the aforesaid decisions what emerges is that there is no presumption of a Joint Hindu Family but on the evidence if it is established that the property was Joint Hindu Family property and the other properties were acquired out of that nucleus and if the initial burden is discharged by the person who claims Joint Hindu Family, then the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property by cogent and necessary evidence.

27. The Hon'ble Apex Court in the case of *K.V. Narayanaswami Iyer v. K.V. Ramakrishna Iyer*, [AIR 1965 SC 289](#) has held that it is well settled that in case on the date of acquisition of a particular property the joint family had sufficient nucleus for acquiring it, the property in the name of any family member of the joint family should be presumed to be acquired from out of family funds and so form part of the joint family property.

28. The Hon'ble Apex Court in the case of *Rukhmabai v. Lala Laxminarayan*, [AIR 1960 SC 335](#) has held that there is a presumption in *Hindu law* of jointness of family but there is no presumption that any property whether movable or immovable held by a member of a Joint Hindu Family is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact and if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family who is claiming to have acquired without any assistance of the joint family property. The same view has been taken by the Hon'ble Apex Court in the case of *Achuthan Nair v. Chinnamu Amma*; [AIR 1966 SC 411](#) and *Surendra Kumar v. Phoolchand (Dead) Through L.Rs.*, [\(1996\) 2 SCC 491](#) : ([AIR 1996 SC 1148](#) : AIR 1996 SCW 695).

29. The Hon'ble Apex Court in the case of *D.S. Lakshmaiah v. L. Balasubramanyam*, [AIR 2003 SC 3800](#) has observed that a property could not be presumed to be Joint Hindu Family merely because of the existence of a Joint Hindu Family and raised an ancillary question in para graph-7 and answered the same in paragraph- 18. The same are extracted below:—

“7. The question to be determined in the present case is as to who is required to prove the nature of property whether it is joint Hindu family property or self-acquired property of the first appellant.

18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.”

30. The same has also been followed by the Hon'ble Apex Court in the case of *Makhan Singh (D) By L.Rs. v. Kulwant Singh*; [\(2007\) 10 SCC 602](#).

31. This Court in the case of *Ruchha v. Deputy Director of Consolidation, Gorakhpur* (supra) has held that it is well settled proposition that even in the Joint Hindu Family a member of said family can acquire land for himself and unless it is proved that the land was acquired by him in the representative capacity out of joint family funds for the benefit of the family it can not be held to be joint family land merely because it was acquired by him when he formed joint family with other members.

32. In the present case since the petitioners were claiming that land in dispute was acquired by the Joint Hindu Family, therefore initial burden was upon the petitioners to prove that it was acquired from the joint nucleus of the Joint Hindu Family. But the burden could not be discharged by the petitioners and they could not prove that it was purchased from the joint nucleus for the welfare of the family.

33. The judgment relied by the learned counsel for the petitioners in the case of (*Smt.*) *Dharmawati Tiwari v. Prem Shanker Tiwari* (supra) is not of any assistance to the case of the petitioners because in that case also the trial court after considering all relevant aspect of the controversy viz. continuity of jointness till the house in dispute is acquired, availability of nucleus of the joint family for purchase of the house in dispute, treatment and conduct of the parties with respect to the property in dispute while raising a presumption of jointness of the family had placed the burden upon the shoulder of the contesting respondents to prove that jointness of the family came to an end from the property in dispute as it was alleged to have been self acquired. But in the present case the petitioners have failed to discharge their initial burden, therefore, the plea of the petitioners that the opposite party Nos. 4 and 5 were required to prove that the jointness of the family has come to an end is misconceived and not sustainable in the eyes of law. In view the aforesaid discussions this Court is of the considered opinion that the judgment and order dated 22.06.1987 passed by the Consolidation Officer and dated 11.03.1999 passed by the Joint Director Consolidation have rightly been passed in accordance with law after considering the material and evidence on record. This Court does not find any illegality or error in the orders. The writ petition has been filed on misconceived grounds having no substance which is devoid of any merit and is liable to be dismissed."

In the judgment passed in the case of *Dropadi Devi v. Shiv Chandra Dixit*, 2020 SCC OnLine All 104, this Court observed as under:-

"51. Now coming to the question regarding the evidence to indicate that the property was a Joint Hindu Family Property, it was for the plaintiffs to have led the evidence in that regard which they have failed. In absence of any evidence to the aforesaid effect the plaintiff could not have been granted the benefit of getting the property treated as Joint Hindu Family Property whereas on the other hand prima-facie the evidence which was available on record clearly indicated that the property in question was purchased by Sri. Shiv Shanker Dubey in the year 1934.

52. It was not disputed by the plaintiff-witness that Sri. Shiv Shanker Dubey was not employee/enlisted in the Army during the First World War. It was also not disputed by the plaintiff and his witnesses that Sri.

Shiv Shanker Dubey was employed in the Loco Work Shop at Lucknow. It was also not disputed that Sri. Shiv Shanker Dubey had earlier purchased a property in the year 1931 which he later sold and thereafter he purchased the disputed house in the year 1934.

53. At this stage it will be worthwhile to notice the law regarding the Joint Hindu Family Property is now fairly well settled that in order to successfully stake a claim regarding a Joint Hindu Family Property, the burden is on the party to indicate that there existed a joint family which had the requisite funds and nucleus out of which the property in question has been purchased.

54. There is a difference between a joint family and a joint family property merely because a joint family exists does not give rise to a presumption that the property also belongs to the joint family. In this regard, this Court draws strength from the decision of the Apex Court in the case of D.S. Lakshmaiah v. L. Balasubramanyam reported in (2003) 10 SCC 310, the relevant portion reads as under:—

18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.

55. Similarly, the Coordinate Bench of this Court in the case of Kunj Bihari v. Ganga Sahai Pande reported in 2013 SCC OnLine All. 13489 : (2013) (99) ALR 826 wherein tracing the history and considering the earlier decision on the point of Joint Hindu Family and property, the burden of proof etc. This Court has held as under:—

24. The “patriarchal family” may be defined as a group of natural or adoptive descendants, held together by subjection to the eldest living ascendant, father, grand-father, great-grandfather. Whatever be a formal prescription of law, the head of such a group is always in practice, despotic; and he is the object of respect, if not always of affection, which is probably seated deeper than any positive institution. Manu says, “three persons, a wife, a son and a slave, are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they belong.” Narada says, “he is of age and independent, in case his parents be dead; during their lifetime he is dependent, even though he be grown old.”

25. The “joint family” is normally a transition form from “patriarchal family”. At the death of common ancestors or head of house, if the family chooses to continue united, the eldest son would be the natural head. The former one was head of family by natural authority, the later other can only be so by a delegated authority. He is *primus* but *inter pares*. An undivided Hindu family thus is ordinarily joint, not only in estate but in food and worship. The presumption, therefore, is that members of a Hindu family are living in a state of union unless contrary is established. This presumption however varies inasmuch as it is stronger in case of real brother than in case of cousin and farther

one go, from the founder of family, the presumption becomes weaker and weaker. However, there is no presumption that a family, because it is joint, possesses joint property. Under Mitakshara Law, possession of property is not necessary requisite for constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive of their possessing no property whatever, such as, at least, ordinary household articles which they would enjoy in common.

32. The joint undivided family is the normal condition of Hindu society as observed in *Raghunadha v. Brozo Kishroe*, (1876) 3 IA 154 and *Neelkisto Deb v. Beerchunder*, (1989) 12 MIA 523. An HUF is ordinarily joint not only in estate but in food and worship. Unless contrary is established, the presumption is that the members of a Hindu family are living in a state of union (see: *Govind Dass v. Kuldip Singh*, AIR 1971 Delhi 151 and *Bhagwan Dayal v. Mst. Reoti Devi*, AIR 1962 SC 287). If, however, one of the coparceners is admittedly living separately from other members of the family, neither it can be said that other members do not constitute a Hindu joint family nor the member living separately, who has stripped his relation with the joint family, can be said to be still a coparcener or member of joint family. Simultaneously, merely if some members are working and living at different places, though own a joint family in common, it cannot be said that they do not form a joint Hindu family. Since it is only a presumption, the strength thereof necessarily varies in every case. The presumption of union is stronger in the case of brothers than in the case of cousins and farther one goes from the founder of the family, the presumption becomes weaker and weaker.

33. Brothers may be presumed to be joint but conclusion of jointness with collaterals must be affirmatively proved. The presumption lies strongly in favour of father and son that they are living jointly unless proved otherwise.

34. This presumption, however, does not apply in respect of property. There is no presumption that a family, because it is joint, possess joint property. As per Mitakshara law, the possession of property is not a necessary requisite for the constitution of a joint family, though where persons live together, joint in food and worship, it is difficult to conceive that they are possessing no property whatever, such as ordinary household articles which they would enjoy in common.

35. In *Sher Singh v. Gamdoor Singh*, 1997 (2) HLR 81 (SC), the Court said that once existence of a joint family is not in dispute, necessarily the property held by family assumed the character of a coparcenary property and every member of family would be entitled, by birth, to a share in coparcenary property, unless any one of the coparcener pleads, by separate pleadings and proves, that some of the properties or all the properties are his self-acquired properties and cannot be blended in coparcenary property. Merely because the family is joint, there is no presumption of joint property. A Hindu, even if he be joint may possess separate property. Such property belongs exclusively to him. Neither member of the coparcenary, nor his male issue, acquires any interest in it by birth. On his death (intestate), it passes by succession to his heirs and not by survivorship to the surviving coparcener. The existence of joint family does not raise presumption that it owns properties jointly. But once joint family nucleus is either proved or admitted so as to

draw inference that such property could have been acquired out of joint family funds, the burden shifts to the party alleging self acquisition, to establish affirmatively, that such property was acquired without aid of joint family. Initial burden always lies upon the party asserting that any item of property is joint family property.

38. In Appalaswami v. Suryanarayanamurti, AIR 1947 PC 189, it was held that Hindu law is very clear. Proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon one who asserts that an item of property is joint, to establish that fact. But where it is established that the family possessed some joint property which, from its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition, to establish affirmatively that the property was acquired without the aid of joint family property/fund.

39. Again in Srinivas Krishnarao Kango v. Narayan Devji Kango, AIR 1954 SC 379, it was held that proof of existence of a joint family does not lead to the presumption that property held by any member of family is joint. The burden rests upon anyone asserting that any item of property is joint to establish the fact. But where it is established that the family possessed some joint property which form its nature and relative value, may have formed the nucleus, from which property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of joint family property.

40. The legal proposition which emerges therefrom is that initial burden is on the person who claims that it is joint family property but after initial burden is discharged, the burden shifts to the party claiming that the property was self acquired and without the aid of joint family property/fund.

41. In Rukhmabai v. Lala Laxminarayan, AIR 1960 SC 335, the Court said:

“There is a presumption in Hindu Law that a family is joint. There can be a division in status among the members of a joint Hindu family by refinement of shares which is technically called “division in status”, or an actual division among them by allotment of specific property to each one of them which is described as “division by metes and bounds”. A member need not receive any share in the joint estate but may renounce his interest therein, his renunciation merely extinguishes his interest in the estate but does not affect the status of the remaining members vis-a-vis the family property, A division in status can be effected by an unambiguous declaration to become divided from the others and that intention can be expressed by any process. Though prima facie a document clearly expressing the intention to divide brings about a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether movable or immovable, held by a member of, a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property. to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the

said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property..." (emphasis added)"

In the case of ***Bhagwat Sharan v. Purushottam*, (2020) 6 SCC 387 : 2020 SCC OnLine SC 348**, the Hon'ble Apex Court observed as under:-

"10. At the outset we may note that a lot of arguments were addressed and judgments were cited on the attributes of HUF and the manner in which it can be constituted. In view of the facts narrated above, in our view, a large number of these arguments and citations need not be considered. The law is well settled that the burden is on the person who alleges that the property is a joint property of an HUF to prove the same. Reference in this behalf may be made to the judgments of this Court in *Bhagwan Dayal v. Reoti Devi* [*Bhagwan Dayal v. Reoti Devi*, AIR 1962 SC 287] . Both the parties have placed reliance on this judgment. In this case, this Court held that the general principle is that a Hindu family is presumed to be joint unless the contrary is proved. It was further held that where one of the coparceners separated himself from other members of the joint family there was no presumption that the rest of coparceners continued to constitute a joint family. However, it was also held that at the same time there is no presumption that because one member of the family has separated, the rest of the family is no longer a joint family. However, it is important to note that this Court in *Bhagwati Prasad Sah v. Dulhin Rameshwari Kuer* [*Bhagwati Prasad Sah v. Dulhin Rameshwari Kuer*, 1951 SCC 486 : 1951 SCR 603] , it held as follows : (SCC p. 491, para 10)

"10. ... Except in the case of reunion, the mere fact that separated coparceners chose to live together or act jointly for purposes of business or trade or in their dealings with properties, would not give them the status of coparceners under the Mitakshara law."

11. The Privy Council in *Randhi Appalaswami v. Randhi Suryanarayanamurti* [*Randhi Appalaswami v. Randhi Suryanarayanamurti*, 1947 SCC OnLine PC 42 : ILR 1948 Mad 440] held as follows : (SCC OnLine PC)

"... The Hindu law upon this aspect of the case is well settled. Proof of the existence of a joint family does not lead to the presumption that property held by any member of the family is joint, and the burden rests upon anyone asserting that any item of property was joint to establish the fact. But where it is established that the family possessed some joint property which from its nature and relative value may have formed the nucleus from which the property in question may have been acquired, the burden shifts to the party alleging self-acquisition to establish affirmatively that the property was acquired without the aid of the joint family property."

The aforesaid view was accepted by this Court in *Shrinivas Krishnarao Kango v. Narayan Devji Kango* [*Shrinivas Krishnarao Kango v. Narayan Devji Kango*, (1955) 1 SCR 1 : AIR 1954 SC 379] .

12. In *D.S. Lakshmaiah v. L. Balasubramanyam* [*D.S. Lakshmaiah v. L. Balasubramanyam*, (2003) 10 SCC 310] this Court held as follows :

(*D.S. Lakshmaiah case* [*D.S. Lakshmaiah v. L. Balasubramanyam*, (2003) 10 SCC 310], SCC p. 317, para 18)

“18. The legal principle, therefore, is that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of joint family nucleus that was available.”

Similar view was taken in *Rukhmabai v. Lala Laxminarayan* [*Rukhmabai v. Lala Laxminarayan*, (1960) 2 SCR 253 : AIR 1960 SC 335] and *Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade* [*Appasaheb Peerappa Chamdgade v. Devendra Peerappa Chamdgade*, (2007) 1 SCC 521]. The law is thus well settled that the burden lies upon the person who alleges the existence of the Hindu Undivided Family to prove the same.”

The ASOC and DDC while rejecting the claim of the claimants/objectors vide impugned order(s) dated 21.05.1973 and 18.07.1978, respectively, have recorded specific finding(s). According to which, family property was partitioned and as per terms of partition, the parties were in possession of the land situated in Village- Khandsara and Chaupuria. Finding(s) related to partition was recorded after observing that the partition is admitted between the parties and both the parties were satisfied by the partition and regarding the property, for which the claimants/objectors were dissatisfied, a suit for partition was instituted by them, which was allowed. It is evident from the impugned order dated 18.07.1978 passed by DDC that for holding that the property was partitioned, the DDC considered the statement of Abhai Narain (one of the claimants/objectors). Finding in regard to possession over Khata No. 88 is also against the claimants/objectors.

The finding(s) aforesaid and rejecting the claim of the claimants/objectors, to the view of this Court, is just and proper. It is for the following reasons:-

(i) From para 4 to 7 of this petition, it appears that the family settlement/partition in respect of land/property which was existing in the name of Bhairon, except Khata No. 88, is admitted.

(ii) As per above indicated paras, according to family settlement, the descendants of Bandhau got land/property of Village- Khandasara and descendants of Gopi got land/property of Village- Chaupuria and with regard to land existing at

Village- Chaupuria, a suit for partition filed by the descendants of Bandhau was decreed and another suit for partition filed from the side of the petitioners with regard to land existing at Village- Khandsara was decreed.

(iii) The Khata No. 88 situated in Village- Khandsara was recorded in the name of Bandhau and the opposite parties are the descendants of Bandhau.

(iv) The petitioners are the descendants of Gopi.

(v) As per the case of the petitioners, the land of Khata No. 88 was of Bhairon. Thus, the claimants/objectors before the CO namely Ram Asrey, Abhai Narain and Deep Narain were of sixth generation, as appears from the undisputed pedigree indicated in the impugned order dated 18.07.1978.

(vi) In the instant case, in the objection under Section 9-A(2) of the Act of 1953, the claimants/objectors have pleaded that the Khata No. 88 is joint family property and as such they are entitled to 1/4 share in this Khata. Thus, in view of the law on issue, the burden to prove the same was on the claimants/objectors.

(vii) The claim of co-tenancy rights cannot be upheld in respect of certain plots of holding but the claim is to be considered and is to be accepted and rejected in toto in respect of holding and not in respect of any portion thereof, as observed in the case of **Jagdamaba Singh** (supra), and to oppose this aspect of the case, nothing has been brought to the notice of this Court.

(viii) In the aforesaid background of the case including in view of the fact that the claimants/objectors were of sixth generation, the claimants/objectors were required to prove that the land/property of Bhairon was never partitioned and for this purpose, they were required to prove that since the time of acquisition of the property till the filing of the claim in consolidation proceeding the family of cousins (first, second, third, fourth.....) and uncles remained joint as also that after the death of the original recorded tenure holder the name of eldest member of the joint family was entered in the revenue records and the same procedure followed till the claim was raised for the first time in consolidation proceedings and/or Bandhau was karta of family, which they failed to prove as appears from the material available on record.

(ix) On the other hand, as per settlement of Abhai Narain (one of the claimants/objectors), considered by DDC while recording the finding regarding

partition, it appears that the land/property of Bhairon was partitioned and to impeach/controvert the same, neither the statement of Abhai Narain has been brought on record nor on this aspect of the case, submissions have been made.

(x) Statement of Patiram, quoted above, also indicates that the land/property of Bhairon was partitioned.

(xi) Filing a suit for partition of a land situated in Village- Khandsara, excluding Khata No. 88 situated in Village- Khandsara, filed by the claimants/objectors also proves that the land/property including Khata No. 88, which was provided to descendants of Bandhau, belonging to Bhairon was partitioned and claimants/objectors were satisfied with the partition expect with regard to land/property in suit.

For the reasons aforesaid, this Court finds that there is no requirement of interference in the impugned order(s) dated 21.05.1973 and 18.07.1978. The petition is accordingly **dismissed**. Cost made easy.

Order Date :- 2.1.2024

Arun/-